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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 AND 536

THE ATLANTIC REFINING COMPANY, ET AL.,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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April 8, 1959

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT	3
THE EVIDENCE	5
FPC ACTION:	
1. Hearing Examiner's Decision	7
2. The FPC's First Order	8
3. The FPC's Second Order	9
4. The FPC's Third Order	11
SUMMARY OF ARGUMENT	14
I	16
II	17
III	17
IV	17
ARGUMENT:	
I. The Natural Gas Act was intended to provide protection to the public against unjust gas rates. With the proposed price seriously in issue, the FPC violated its duty under the Act in authorizing the CATCO sale unconditionally	21
A. The FPC abandoned consumer price safeguards at CATCO's insistence, and the Court below properly reversed	22

PAGE

B. The statute and its history require the FPC to exercise its powers to protect the public against excessive initial prices 28

1. Rates are the heart of natural gas regulation 28

2. Only at the certificate stage can the public be protected against excessive initial rates, and Congress intended such protection 30

II. The FPC has avoided its responsibility to protect the public against excessive initial rates 33

A. FPC treatment of initial rates—pipeline cases 33

B. FPC treatment of initial rates—producer cases 35

1. Cities Service Gas Co. 36

2. Anthony J. Tamborello 39

3. Natural Gas Pipeline Co. of America 41

4. Seaboard Oil Co. 44

5. Hope Natural Gas Co. 46

6. Superior Oil Co. 48

7. Transcontinental Gas Pipe Line Corp. (Texaco-Seaboard) 49

C. The relevance and use of field prices 50

III. The argument that administrative convenience requires deferring initial rate considerations to §5(a) proceedings is baseless 53

IV. The Record is Devoid of Any Evidence of Need. No Valid Finding Could be Made that a Need for the CATCO Gas Existed Therefore, and

PAGE

Absence of Price Justification Could Not be Excused on the Basis of Need 56

CONCLUSION 61

APPENDIX 1a

TABLE OF CITATIONS

Court Cases:

Alabama-Tennessee Natural Gas Co. v. *FPC*, 203 F. 2d 494 (3d Cir. 1953) 35

American Power & Light Co. v. SEC, 141 F. 2d 606 (1st Cir. 1944), *aff'd*, 329 U. S. 90 (1946) 26, 27

American Trucking Ass'ns v. *United States*, 355 U. S. 141 (1957) 30, 59

Bel Oil Corp. v. *FPC*, 255 F. 2d 548 (5th Cir.), *cert. denied*, 79 S. Ct. 46 (1958) 43, 50

City of Detroit v. *FPC*, 230 F. 2d 810 (D.C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956) 22, 28, 43, 45, 50

FPC v. *Colorado Interstate Gas Co.*, 348 U. S. 492 (1955) 27

FPC v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) 22, 28

FPC v. *Interstate Natural Gas Co.*, 336 U. S. 577 (1949) 22, 28

Florida Economic Advisory Council v. *FPC*, 251 F. 2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U. S. 959 (1958) 42, 43, 47

Isbrandtsen Co. v. *United States*, 96 F. Supp. 833 (S.D.N.Y. 1951), *aff'd*, 342 U. S. 950 (1952) 52

Midwestern Gas Transmission Co. v. *FPC*, 258 F. 2d 660 (D.C. Cir. 1958) 57

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951) 31

Ohio Bell Telephone Co. v. *Public Utilities Comm'n*, 301 U. S. 292 (1937) 57, 58

PAGE

Oklahoma Natural Gas Co. v. *FPC*, 257 F. 2d 634 (D.C. Cir.), *cert. granted*, 79 S. Ct. 117 (1958), *dismissed on motion of petitioner*, —— U. S. ——, February 20, 1959 ..... 32, 33, 41-43

Panhandle Eastern Pipe Line Co. v. *FPC*, 169 F. 2d 881 (D.C. Cir.), *cert. denied*, 335 U. S. 854 (1948) 35, 47

Panhandle Eastern Pipe Line Co. v. *FPC*, 204 F. 675 (3d Cir. 1953) 59

Panhandle Eastern Pipe Line Co. v. *Public Service Comm'n of Indiana*, 332 U. S. 507 (1947) 22

Phillips Petroleum Co. v. *Wisconsin*, 347 U. S. 672 (1954) 21, 22, 28

Schaffer Transportation Co. v. *United States*, 355 U. S. 83 (1957) 29, 59

Signal Oil & Gas Co. v. *FPC*, 238 F. 2d 771 (3d Cir. 1956), *cert. denied*, 353 U. S. 923 (1957) 9, 17, 33, 36, 38-41, 43-45, 50, 52, 53

United Corp., In re, 249 F. 2d 168 (3d Cir. 1957) 57

United Gas Improvement Co. v. *FPC*, *pending on appeal* (3d Cir. No. 12797) 21, 49

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956) 45

FPC Cases:

Alabama-Tennessee Natural Gas Co., 7 F.P.C. 257 (1948) 35

9 F.P.C. 461 (1950) 35

9 F.P.C. 849 (1950) 35

American Louisiana Pipeline Co., Docket G-2306 8

Anthony J. Tamborello, 11 P.U.R. 3d 413 (1955) 39, 40

Atlantic Refining Co., Docket G-9283 12

Docket G-9284 12

Docket G-11034 3

PAGE

Cities Service Gas Co., 12 P.U.R. 3d 3 (1955), *aff'd sub nom. Signal Oil & Gas Co.* v. *FPC*, 238 F. 2d 771 (3d Cir. 1956), *cert. denied*, 353 U. S. 923 (1957) 9, 17, 25, 30, 36-38, 41, 55

Cities Service Production Co., Docket G-9510 12
Docket G-11046 3

Continental Oil Co., Docket G-11024 3
Docket G-16966 12

El Paso Natural Gas Co., Docket G-12580 58
Docket G-13862 58

Erie Gas Service Co., 10 F.P.C. 22 (1951) 35

Hope Natural Gas Co., 19 F.P.C. 405 (1958) 46

Houston Texas Gas & Oil Corp., 16 F.P.C. 118 (1956) 35

Kansas Pipe Line & Gas Co., 2 F.P.C. 29 (1939) 35

Michigan-Wisconsin Pipe Line Co., 6 F.P.C. 1 (1947), *aff'd sub nom. Panhandle Eastern Pipe Line Co.* v. *FPC*, 169 F. 2d 881 (D. C. Cir.), *cert. denied*, 335 U. S. 854 (1948) 35

Midwestern Gas Transmission Co., Docket G-9451 57
Docket G-9453 57

Natural Gas Pipeline Co. of America, 16 F.P.C. 80 (1956), *rehearing denied*, 17 F.P.C. 85 (1957), *aff'd sub nom. Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634 (D. C. Cir.) *cert. granted*, 79 S. Ct. 117 (1958), *dismissed on motion of petitioner*, —— U. S. ——, February 20, 1959 ..... 41, 42

Pan American Petroleum Corp., 19 F.P.C. 463 (1958) 43, 50

Seaboard Oil Co., 19 F.P.C. 416 (1958) 37, 44-46, 48, 49, 51, 53

PAGE

Superior Oil Co., 19 F.P.C. 637 (1958) 21, 48, 51

Tennessee Gas & Transmission Co., 4 F.P.C. 293 (1945) 34, 39
Tennessee Gas Transmission Co., Docket G-5259 18
Docket G-11107 ..... 3, 6-8, 56, 58
Docket G-17166 7
9 F.P.C. 271 (1950) 34
Texas Co., Docket G-8969 22
Texas Illinois Natural Gas Pipeline Co., 9 F.P.C. 105 (1950) 34
Tidewater Oil Co., Docket G-9932 12
Docket G-11049 3
Docket G-13310 12
Trans-Continental Gas Pipe Line Co., 7 F.P.C. 24 (1948) 35
Transcontinental Gas Pipe Line Corp., 20 F.P.C. 264 (1958), *appeal pending sub nom. United Gas Improvement Co.* v. *FPC* (3d Cir. No. 12797) 21, 22, 37, 38, 40, 49, 51, 52
Docket G-12059 34
9 F.P.C. 32 (1950) 34
Trunkline Gas Supply Co., 8 F.P.C. 250 (1949) 35

Union Oil & Gas Corp. of Louisiana, 17 F.P.C. 544 (1957) 55
United Gas Pipe Line Co., 10 F.P.C. 35 (1951) 35

Statutes:

Interstate Commerce Act, 49 U.S.C. Sections 1-1022:
Section 207(a) 29

Natural Gas Act of June 21, 1958, c. 556, 52 Stat. 821, as amended by 56 Stat. 83 (1942), 15 U.S.C. Sections 717-717w:
Section 4 ..... 10, 12, 13, 43, 45, 48, 50, 51, 54, 55

PAGE

Section 4(a) 16, 31
Section 4(c) 31
Section 4(d) 31, 35
Section 4(e) 31, 33
Section 5(a) 9, 12, 15-17, 31, 33, 34, 38, 43, 48, 50, 51, 53-55, 59
Section 7 ..... 2, 3, 14, 16-19, 26, 30, 32, 36, 37, 45, 47, 60
Section 7(c) 32
Section 7(g) 32
Section 19(b) 26

Public Utility Holding Company Act of 1935, 15 U.S.C. Sections 79-79z:
Section 11(b)(2) 27

Miscellaneous:

Federal Power Commission's Annual Reports to Congress:
1949 Report 34
1950 Report 34
1951 Report 34
1952 Report 34
1953 Report 34
1954 Report 34
1958 Report 52

Federal Power Commission Rules and Regulations: Section 1.32(b), 18 C.F.R. §1.32(b) 56

H.R. 6790, 85th Cong., 1st Sess. (1957) 11

Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5429, 77th Cong., 1st Sess. (1941) 32, 33

House Report No. 1290, 77th Cong., 1st Sess. (1941) 33

PAGE

Senate Report No. 948, 77th Cong., 2d Sess. (1942) 33

Address by Commissioner Arthur Kline, Independent Natural Gas Association of America Convention, September 16, 1958 31

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Connole, *Threshold Prices: A Practical Proposal for Producer Pricing,* 63 Pub. Util. Fort. 23 (1959) 51

Direct Sales by Producers of Natural Gas to Reporting Interstate Natural Gas Pipeline Companies—1957 (FPC pamphlet) 21

Tennessee Gas Transmission Co., Registration Statement filed February 26, 1958 (File 2-13923) 58

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Opinions Below

The opinion of the Court of Appeals (R. 653-662) is reported at 257 F. 2d 717. The opinion of the Federal Power Commission (R. 484-497) is reported at 17 F.P.C. 880.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for rehearing were denied on August 27, 1958 (R. 666-667). The petitions for writs of certiorari were filed on November 14, 1958 (No. 518) and on November 24, 1958 (No. 536) and were granted on January 12, 1959 (R. 669). The jurisdiction of this Court rests on 28 U.S.C. §1254(1) and §19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended by 72 Stat. 947 (1958), 15 U.S.C. §717r(b).

Statutes Involved

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938) as amended by 56 Stat. 83 (1942), 15 U.S.C. §§717-717w are set out in the Appendix, *infra*.

Question Presented

The FPC twice refused to authorize the sale of natural gas at an initial price of 21.4 cents per mcf (which was over 25% higher than the highest price theretofore paid by the pipeline buyer and which set a new high price level for the southwestern United States) because the record was deficient to show that the public interest required the sale at that price, as required by §7 of the Act. Did the FPC err subsequently when, on the identical record, it bowed to the producers' threats to withhold the gas, ignored procedures available under the Act offering complete price protection to the consuming public as well as to the producers, and entailing no administrative disadvantage, and unconditionally authorized the sale at the price demanded by the producers?

Statement

This case results from separate applications to the FPC late in 1956 by the CATCO companies[1] for certificates of public convenience and necessity under §7 of the Natural Gas Act for the sale of natural gas to Tennessee Gas Transmission Company[2] at an initial price of 21.4 cents per mcf.[3] Twice having held that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level [21.4 cents]" (R. 612, 604), the FPC finally yielded to CATCO's concerted threats to withhold the gas unless permitted to receive that price without liability for a refund if the price proves to be unlawful, and granted the certificates unconditionally on the identical evidence and without withdrawing its earlier findings (R. 570-574). The Court below reversed (R. 653-662).

CATCO dedicated up to 2 trillion cubic feet of natural gas (R. 25a) from leases off the Louisiana shore in the Gulf of Mexico (R. 23a) to the sale. This is the largest reserve ever committed to one sale (R. 521). The initial price of 21.4 cents is more than 25% higher than the highest price paid by Tennessee for gas in the entire southwest (R. 216a), including offshore gas (R. 150a-151a), 70% higher than Tennessee's weighted average cost

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[1] Continental Oil Company (Docket G-11024), The Atlantic Refining Company (Docket G-11034), Tidewater Oil Company (Docket G-11049) and Cities Service Production Company (Docket G-11046). These dockets were consolidated for hearing.

[2] An interstate pipeline company hereinafter referred to as "Tennessee". In September, 1956, Tennessee applied for a certificate to expand its facilities, which expansion the CATCO gas was intended to supply. This application (Docket G-11107) was not consolidated with the CATCO applications. No final order was made in this proceeding until January 28, 1959, when the application was granted in major part.

[3] This price excludes reimbursement for Louisiana gathering and severance taxes.

of gas (R. 44a), and more than 100% greater than the price paid by Tennessee elsewhere in southern Louisiana (R. 149a). The contracts provide for price escalations of 2 cents per mcf each 4 years to a maximum price of 35.4 cents per mcf (R. 310a). These escalations are steeper than those in any of Tennesee's existing contracts (R. 214a). Favored nations and price redetermination clauses (R. 91a-92a)[4] can further increase the CATCO charges. Additionally, CATCO can remove for its own use up to 10% by volume of the gas sold to Tennessee and Tennessee is required to transport this amount of gas for CATCO to an onshore point without charge (R. 300a-301a).

Hearings were held on February 28 and March 1, 1957. Long Island Lighting Company and Public Service Electric and Gas Company, purchasers of natural gas from Tennessee, and the New York Public Service Commission intervened (R. 330a-331a), and all participated fully.

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[4] The favored nations clauses provide that if Tennessee were to purchase other gas in a certain area at a higher price, the CATCO contracts would automatically escalate to the higher price. The price redetermination clauses provide for redetermination (but only upward) of the CATCO price on the basis of the three highest prices paid in the pricing area.

The CATCO agreements as filed with the CATCO applications did not contain such clauses and the existence of any amendatory agreements bearing on price was actually denied (R. 85a). On cross-examination, however, it developed that the CATCO contracts had each been materially amended. The favored nations and price redetermination clauses were added by letter agreements in either of two cases: if the FPC accepts and allows a producer rate increase resulting from the operation of such clauses in a similar contract or if the law should be changed to provide that the FPC has no jurisdiction over the producers' price to a transmission company (R. 91a-92a). Such clauses would be operative south of a line plotted on a map attached to the letter agreements or, if a boundary dispute between Louisiana and the United States relating to the off-shore lands is settled, such clauses would be operative south of the southerly boundary of Louisiana so determined (R. 92a).

[5] Hereinafter sometimes referred to as "LILCO", "Public Service" and "PSC", respectively.

The Evidence

The CATCO price was set in a seller's market (R. 41a-42a, 201a); it was unprecedented (R. 216a) and the economic consequences resulting from certification of the huge package of gas involved are enormous.[6] The only price justification attempted by CATCO in the skimpy record it made is that the price was set by bargaining at arm's length (R. 43a). Indeed, the only fact adduced by the applicants even tending to show that the sale might be in the public interest was that a large package of gas was involved (R. 41a-42a). No evidence whatsoever was introduced on the subject of need for the gas.

CATCO presented only one witness (R. 70a-71a), a regional land superintendent for Continental, who sponsored the virtually identical (R. 21a-22a, 23a) CATCO agreements with Tennessee (R. 20a). His duties related to the acquisition, development and disposition of leases (R. 72a), including the clearing of title, the preparation of deeds and the negotiation of contracts with companies jointly interested (R. 73a). He testified that he had no responsibility for entering into gas sales agreements (R. 79a) and did not in fact negotiate them (R. 67a, 80a).

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[6] The cost per day of the initial quantity of gas involved is $39,200 and the annual cost is $14,308,000. If the initial price were 17 cents, which the FPC at one stage herein felt was in the public interest (see p. 10, *infra*) the cost to consumers over the life of the contracts would be at least $56,210,000 less.

Not the least of the consequences is the possible triggering of price increases which could result from approval of the CATCO price. Tennessee has contracts covering gas purchases at slightly more than 10 cents per mcf in southern Louisiana. These contracts contain two party favored nations and price redetermination clauses (R. 149a) under which, if Tennessee were to purchase other gas in the same area, the contract prices would be escalated. Although CATCO categorically states in its brief that the sale will not trigger favored nations or price redetermination clauses, CATCO Brief, pp. 4, 25, 29, Tennessee's witness, while under oath at the hearing, was unable to give such assurance (R. 148a-159a).

Moreover, he could not interpret them (R. 66a-67a, 84a). These four agreements are for a 20 year term (R. 316a) and call for deliveries, at offshore platforms or other mutually agreed points (R. 304a), of 175,000 mcf per day the first year (R. 289a), and 240,000 mcf per day thereafter (R. 210a). Initial deliveries were originally scheduled for November 1, 1957 (R. 25a), until the time was extended. Failure to place the reserves in production by 1958 might have jeopardized the leases (R. 26a-27a).[7]

Facilities to carry the gas from the offshore platforms to an existing transmission line owned by Tennessee are to be built by Tennessee at a cost of approximately $16.3 million (R. 46a).

Tennessee, in support of the CATCO applications presented two witnesses, the director of its reserve department (R. 32a) who estimated the CATCO reserve to be 11 or 12% of Tennessee's total (R. 139a-140a),[8] and its vice president in charge of gas purchases (R. 40a), who negotiated the CATCO agreements on Tennessee's behalf (R. 41a)

> "* * * to obtain gas reserves to supply the expansion of Tennessee's markets, as is shown in Tennessee's pending application in Docket G-11107."

Additional factors considered by Tennessee were that the gas reserves are well located and are large; and Tennessee might acquire additional reserves to be developed in the area in the future (R. 41a-42a). He acknowledged that the CATCO gas would raise Tennessee's weighted average cost of gas approximately 1 cent (R. 45a)—some 8%, but

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[7] Deliveries of gas by CATCO to Tennessee have actually begun.

[8] There was no cross examination on the adequacy of the reserves because intervenors were not shown the working papers underlying the computation of the reserves and the issue was deferred to the Docket G-11107 proceedings (R. 123a, 129a-130a).

he refused, with the approval of the hearing examiner, to present the working papers underlying this computation (R. 204a-205a). Attempts to elicit meaningful price data were actually frustrated. Thus, although it would appear that the actual cost to Tennessee of the CATCO gas will be in excess of 25 cents per mcf because of the cost to Tennessee of the gathering facilities, Tennessee's vice president stated he had not considered the matter (R. 196a) and would neither confirm this estimate nor give any estimate of his own (R. 225a-226a).[9]

Although he stated that the initial price in the CATCO contracts, "by itself," would not cause a rate increase filing by Tennessee (R. 202a), he acknowledged that he had no responsibility for Tennessee's rate filings and had made no study of the subject (R. 202a-203a).[10]

FPC Action

1. Hearing Examiner's Decision

On March 29, 1957[11] the hearing examiner issued his decision (R. 498-518). He pointed out that (R. 509)

> "* * * Tennessee's purpose was to obtain gas reserves to supply the expansion of Tennessee's

[9] This estimate was derived by taking the cost to Tennessee of the gathering facilities and then computing depreciation, return and tax on return to get an annual cost which, when applied to the annual volume of gas to be put through these facilities, produced an indicated cost per mcf more than 3 cents greater than the contract price.

[10] These hedging responses are understandable: Since the CATCO deliveries commenced Tennessee has filed an application with the FPC for higher rates designed to produce $19,18 ,000 additional revenue annually. Tennessee claims the additional revenue is needed because of the higher field prices it must pay for gas, *including the CATCO gas. Tennessee Gas Transmission Co.*, Docket G-17166 (application filed November 14, 1958). Thus, the CATCO assertion: "Nor will the proposed price cause Tennessee to request an increase in its rates (R. 202)," CATCO Brief, p. 29, is inaccurate.

[11] The same day, the FPC issued its order denying a motion to consolidate Tennessee's application for a certificate (Docket G-11107)

> market as shown in Tennessee's pending application in Docket G-11107. None of the data which it is assumed was filed in support of such application is in evidence in this proceeding."

and that (R. 516)

> "• • • any finding to the effect that public convenience and necessity requires or will require the issuance of certificates to Applicants in this proceeding would be confronted with the fact that a contrary finding made with respect to Tennessee's application for a certificate which is pending in Docket No. G-11,107 would be in fact in conflict as Tennessee proposes to use the reserves which are the subject of this proceeding in connection with its expansion program which is the subject of its application in G-11,107."

Accordingly, he granted the requested certificates, but conditioned the grant on Tennessee's receiving authorization in G-11107 to construct the facilities there requested (R. 518).

2. The FPC's First Order

On April 22, 1957 the FPC reversed its hearing examiner. It found (R. 521):

> "The record contains insufficent evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level

to expand its system's capacity despite the fact that the avowed purpose of the purchase from CATCO was to supply this expansion. It did, however, consolidate Docket G-11107 with 19 other dockets unrelated to CATCO. *American Louisiana Pipeline Co.*, Docket G-2306. Hearings therein did not even begin until May 14, 1957, shortly before the FPC's second order in CATCO (see pp. 10-11, *infra*). No final order was issued by the FPC in Docket G-11107 until January 28, 1959.

here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

"Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See Cities Service Gas Co., Signal Oil and Gas Co., 14 F.P.C. ———, opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (CA 3), certiorari denied, 353 U. S. 923."[12] (Emphasis added)

The FPC granted CATCO a temporary certificate (R. 523) and remanded the proceedings to the hearing examiner (R. 524)

"• • • to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity."

3. The FPC's Second Order

CATCO moved for modification of the first order, allegedly because it (R. 527)

[12] In *Signal*, 12 P.U.R. 3d 3, the FPC held that the public interest in just and reasonable prices could not be protected by deferring consideration of the appropriateness of the proposed initial price of 12 cents to a §5(a) proceeding. Accordingly, since the applicant had not supported the 12 cent price and since that price would have disrupted the 10 cent price pattern prevailing in the area, the FPC conditioned its certificate on Signal's charging only 10 cents.

"Signal" and *Cities Service"* are used interchangeably throughout this brief.

> "• • • could not present sufficient evidence at the hearing ["to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity"] contemplated by the Commission's order within any reasonable period in the future and could not afford to commence construction until at least the initial rate question is resolved."

On May 20, 1957, the FPC issued its second order. It reiterated that (R. 528)

> "• • • the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at the particular rate level."

To satisfy the "need" for the gas and at the same time to "insure that the interests of consumers are protected not only as to the future prices, but as to the *initial* price" (R. 528) (emphasis added) and to assure CATCO "of receiving the proper price under standards of the Act" (R. 529), the FPC devised an equitable solution:

1. It granted permanent certificates to CATCO.

2. It conditioned the grant on CATCO's acceptance of an initial price of 17 cents (the highest price theretofore paid by Tennessee).

3. It committed itself to permit escalation of the 17 cent price to 21.4 cents one day after commencement of deliveries of gas, the increased amount to be collected under bond subject to proof of its reasonableness (in subsequent proceedings under §4 of the Act).

The second order thus gave CATCO all it could reasonably ask. If CATCO could ultimately justify the 21.4 cent

price it would retain the entire amount. On the other hand, if a lesser amount were shown to be just and reasonable, consumers would be reimbursed the difference between that amount and the 21.4 cent price.

As a matter of fact, only the consumers might be hurt under the second order. If, for example, the just and reasonable price ultimately were determined to be 13 cents, the consumers' protection would be incomplete to the extent of 4 cents, the difference between the permitted price of 17 cents and the just and reasonable 13 cents. Thus, the second order was actually favorable to CATCO.[13]

4. The FPC's Third Order

Tennessee (but not CATCO) sought rehearing for the purpose of informing the FPC of CATCO's unwillingness to accept the second order (R. 418a).

Oral argument was permitted, and the FPC on June 24, 1957, on the identical record previously before it, yielded to the CATCO threat to withhold the gas and entered the order under review. It did not withdraw its earlier findings but explained the retreat from its earlier attempts to insure fairness to all as motivated "by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas." Confronted with the unwillingness of CATCO to accept any but the contract rate, and in view of "the fact that the record does not show that the 21.4

[13] To avoid loss of control over subsequent price increases in the event of the passage of the Harris Bill, H. R. 6790, 85th Congress, which if enacted would have eliminated FPC jurisdiction over contract clauses specifying definite price escalations, the FPC also ordered modification of the CATCO contracts to provide for indefinite price increases which would be governed by "reasonable market price" (R. 531-532). This modification had been offered by CATCO in an attempt to salvage unconditionally the 21.4 cent initial price.

cent rate is *necessarily*[14] excessive," the FPC felt that it could "adequately protect the public interest with respect to the matter of price" in proceedings under §§4 and 5(a). The third order therefore unconditionally authorized the CATCO sale and noted that the price "will be subject to rate investigations [under §5(a)] now outstanding against * * * [the CATCO companies]" (R. 487-488).[15]

Three commissioners voted for this order. Commissioner Connole dissented. He stated (R. 496):

> "Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by the decision makes it clear that the only practical market for gas of this kind for years to come is the large consuming areas served by the long haul interstate pipelines.[16] In

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[14] Tennessee quotes from the third order, as follows: "* * * the Commission found that 'the record does not show that the 21.4 cent price is excessive.'" Tennessee Brief, p. 9. It must be noted that the omission of "*necessarily*" from the quotation distorts the finding of the FPC.

[15] The FPC was relying on then pending separate §5(a) proceedings involving the CATCO companies. Now, more than 19 months later, the proceedings involving Continental (Docket G-16966) and Tidewater (Dockets G-9932 and 13310) are still preoccupied with *1955* rates and costs; the CATCO sales have not been considered, and there is no indication when they will be considered, if ever. The producers have presented no evidence bearing on the reasonableness of the CATCO rate; neither has the FPC's staff, which apparently does not regard the third order as a mandate to investigate the CATCO rate. Continental has moved to dismiss the §5(a) proceeding involving it.

In its §5(a) proceeding, Docket G-9510, Cities Service has completed its direct case. It limited itself to a 1957 test year, which was prior to the commencement of the CATCO service. Further proceedings are not scheduled until September, 1959.

The Atlantic §5(a) proceeding, Dockets G-9283 and 9284, have never been set down for hearing.

[16] The impracticality of the CATCO threat is revealed by the recent history of natural gas usage. In 1951 marketed production of natural gas exceeded 7.45 trillion cubic feet. Of this amount over

my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

* * * * *

"In my opinion, the consequences of abandoning our position will be more serious than their effect on this particular sale. Whether by design or accident, the issues in this proceeding now transcend the close limits of the original hearing. At stake is the question whether the Commission should hold a position which it has determined is in the long run public interest, or whether it should abandon it when confronted with allegations that short run injury to one segment of the industry and consumers might result. When the issue is reduced to this simple statement, the answer is clear."

Rehearing was denied August 15, 1957 (R. 541-542).

The FPC thus abandoned the second order, not because of any asserted unfairness to CATCO, but simply because CATCO would not accept it; CATCO insisted that it would neither prove in the certificate case that it was entitled to the high price, nor permit that determination to be made in a rate increase proceeding under §4 where

3.24 trillion cubic feet, or 43.5%, were shipped interstate. Bureau of Mines, *Minerals Yearbook 1951*, p. 881. By 1957 marketed production had exceeded 10.68 trillion cubic feet, of which amount 6.05 trillion cubic feet, or 56.7%, were shipped interstate. Bureau of Mines, *Mineral Market Report MMS No. 2833*. Thus, in this seven-year period, interstate shipments increased 86.6%, whereas intrastate use increased less than 10%.

refunds would have to be made if the price could not be justified. On the appeals of LILCO and Public Service, and of the PSC, the Court of Appeals for the Third Circuit unanimously reversed and remanded the proceedings. 257 F. 2d 717 (R. 653-662). It held (1) that the FPC was not authorized by the Act to decide whether public convenience and necessity required the sale without protecting the public on the question of price; it was not free to conduct the "limited inquiry" whether the sale was in the public interest *except for price;* and (2) that CATCO had demonstrated its unwillingness to conform to the requirements of the Act and therefore was not entitled to the requested certificate.

Rehearing was denied on August 27, 1958 (R. 667), and petitions for certiorari were filed thereafter by CATCO and Tennessee. Respondents LILCO and Public Service, as well as the PSC, prevailing parties below, urged the granting of certiorari because of the urgent need for a definition by this Court of the FPC's responsibilities under §7 of the Natural Gas Act. Although the decision below reversed its order, the FPC took no position on the petitions and did not itself petition this Court for review. Certiorari was granted on January 12, 1959 (R. 669).

Summary of Argument

This is not a case where there is a settled system of regulation, applied to an industry which accepts it. We have an unusual regulatory situation, in that the system of determining producer rates is being fashioned at the same time that the natural gas industry is expanding very rapidly, resulting in a seller's market and skyrocketing prices. Rate cases can take a long time. It is therefore necessary to devise techniques which will enable the expansion of the industry to take place at the same

time that regulatory principles are being worked out, without hurting the public interest in not paying more than just and reasonable rates or the producer interest in not receiving less than that amount. There are several possibilities:

(a) Leave determination of the reasonableness of producer initial rates to §5(a) proceedings, as CATCO and Tennessee urge. But this will take years, and is unfair to the public because the §5(a) decisions can have no retroactive effect. In the meantime natural gas costs are skyrocketing.

(b) Convert every certificate case into a rate case. (This is the position which petitioners incorrectly claim we take.) But this would be needless—many of these cases are very small, and most of them do not raise any serious price question.

(c) Where there is a serious price question, either (1) turn the certificate case into a rate case if there is time, or (2) apply one of the many other types of price conditions which the FPC has evolved over the years, such as the CATCO second order, which can hurt nobody.

This third possibility is the one we urge; and by "serious price question" we mean a price that appears high in light of the existing pattern of prices, having in mind such related questions as the volume of the sale, effect on consumers and the possible presence of triggering.

We urge four points in this brief. First, that the FPC's decision was an abandonment of protection of consumers against excessive initial rates, an abandonment forbidden by the Act. Second, that the FPC's whole approach to initial rates is an evasion of its responsibility. Third, that this abandonment and evasion cannot be justified on

grounds of administrative convenience, or Fourth, on the ground of any real "need" of Tennessee for the gas.

I

The FPC twice here held that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at" 21.4 cents, as contrasted with the previous high of 17 cents. Nevertheless, when CATCO threatened to withhold the gas from the interstate market unless permitted unconditionally to receive that price (which had been exacted in a seller's market) the FPC yielded to the threat, discarded its second order which gave effective price protection to all the parties and sanctioned this new high price without requiring any indication whatever of its reasonableness.

We argue that with the reasonableness of the proposed price seriously in issue, this abandonment by the FPC of effective price protection for consumers was error. It was error in light of the plain mandate of §4(a) of the Act that "All rates and charges * * * shall be just and reasonable", a provision which is at the very core of the Act and in light of which all its other provisions must be interpreted. §5(a) does not protect the public against excessive initial rates because it contains no provisions for refunds of the excessive amounts, a fatal defect in view of the FPC's conviction (which we share) that these rate cases will take a very long time. But the relevant legislative history shows that §7 was intended to permit the FPC to scrutinize proposed rates at a time when revision in the public interest would be effective rather than at a later stage when it would not be.

II

In pipeline certificate cases, the FPC has for many years construed §7 as requiring scrutiny of initial rates, and imposing a burden of proof on the applicant for the certificate. Many techniques have been developed by the FPC in these cases, to protect the public against excessive initial rates. We do not suggest that every producer certificate case be turned into a rate case; but the FPC's practice, exemplified by this case, of limiting its investigation of producer initial rates to the sole question whether they were determined by arm's length bargaining, has done violence to the primary purpose of the Act by abetting exploitation of the public by producers.

The FPC has set up criteria as to when the public is entitled to protection against initial producer rates, and then changed the criteria when the next case met them, finally arriving at a standard which at best affords practically no protection, and anyway is not applied in fact. CATCO exemplifies this.

III

The FPC seeks to defend its policy of deferring consumer protection to §5(a) cases, on the ground of administrative convenience. But in fact it is administratively *more* difficult to handle the problem in that way, as the Commission has conceded in *Cities Service Gas Co.*, 12 P.U.R. 3(d) 3, 15 (1955); *aff'd sub nom. Signal Oil & Gas Co. v. FPC*, 238 F. 2d 771 (3d Cir. 1956), *cert. denied*, 353 U. S. 923 (1957); and meanwhile the public is forced to pay excessive rates.

IV

Only a single statement in the entire record even remotely relates to Tennessee's "need" for the CATCO gas. Tennessee said it made the CATCO contracts "to

supply the expansion of Tennessee's markets, as is shown in Tennessee's pending application in Docket G-11107" (R. 41a).

We do not argue that a "need" of the public for additional gas could never be so great that price considerations should be superseded. That question is not reached here. The point is that the FPC's treatment of "need" in relation to price protection will not withstand analysis.

Assuming that need may be balanced against price in deciding where the paramount public interest lies, the degree of "need" at a price, and the effect of that price on old and new consumers, are to a great extent capable of measurement. However, the record here does not contain the facts which permit any such measurements. The FPC was therefore unable, in its third order, to make findings which evince a rational balancing of the competing factors. The conclusion of need contained in the third order is not supported and is not supportable.

It may be argued that "need" can be inferred from the very existence of the CATCO contract. For, unless Tennessee would have some use for the gas—here expansion—it would not have been willing to buy it. But, every §7 proceeding results from a desire to expand, and an existing contract is an indispensable requisite. This expansion by Tennessee (at the expense of other pipelines which sought but did not get the CATCO gas) was in its business interest, which can hardly be equated with the public interest.

Tennessee's gas purchase costs are part of its cost of service and are considered in fixing Tennessee's rates. Once the FPC certifies a sale to a pipeline, it will not permit the price to be collaterally attacked in a pipeline rate case. See order of FPC issued July 14, 1953 in *Tennessee Gas Transmission Co.*, Docket G-5259. Thus there is little if any compulsion on a pipeline to bargain hard on price.

If the "need" the FPC talks of in this case is this garden variety desire-to-expand type of need, then the FPC has made it clear that price is always a minor consideration, a consideration which will be finessed if the applicant so demands. It must be noted that the greater the need of the pipeline, the greater the price which can be exacted by the producer, and the greater the price protection required by the public. Yet in just such a circumstance the greater the FPC's willingness to forego price consideration.

Unless §7 proceedings are to be reduced to mere formalities, the existence of a contract can not be held to be evidence of such need as would permit effective price consideration to be ignored.

* * * * *

What is suggested is that the FPC must take reasonable steps to safeguard the public interest in a just price when it is asked to grant a certificate under §7. Only at that juncture can protection be afforded. The FPC has practical methods of accomplishing this whenever there is reason to believe that the proposed rate may not be within the range of reasonableness. It may require the producer applicant to present such meaningful data bearing on the justness and reasonableness of the initial price as could result in a valid finding in the §7 proceeding that the public interest requires the grant of the requested certificate at the proposed price. Or, if such data are not presented, it may employ some technique among the battery of techniques at its command to authorize the sale, and yet insure that the public will not be harmed until such time as the justness and reasonableness of the initial rate can eventually be determined.

Here the FPC did not require CATCO to present meaningful price data, and CATCO did not do so voluntarily.

The 21.4 cent price was not shown to be in the public interest and the FPC so held. In this posture of the case, the FPC was not free to sanction the 21.4 price. The FPC should have resorted to the second alternative and, indeed, it did so prior to making the order under review and arrived at two successive feasible solutions.

Its first order granting a temporary certificate permitted prompt construction of facilities necessary for the sale while at the same time making provision for the determination of a rate which would be in the public interest prior to the granting of a permanent certificate. When CATCO objected to this fair solution, the FPC was most accommodating. It withdrew the first order and issued the second order.

By the FPC's second order herein—setting a 17 cent price and permitting escalation to 21.4 cents one day later under bond—it guaranteed fairness to all concerned.

The first and second orders permitted prompt gas delivery and it deferred price consideration to a future hearing; the third order now under review did the same. All of these orders envisage further administrative action with respect to price. The difference is that the abandoned first and second orders assure price protection to both producers and consumers; the third order does not.

CATCO and Tennessee urge that the FPC is not required to convert every certificate case into a rate case; that to do so would be to bog down the regulatory process. We agree. But this argument is irrelevant. There is no issue of administrative convenience in this case. The issue is the FPC's freedom to forego effective protection of the public interest in just prices.

ARGUMENT

I

The Natural Gas Act was intended to provide protection to the public against unjust gas rates. With the proposed price seriously in issue, the FPC violated its duty under the Act in authorizing the CATCO sale unconditionally.

In 1954, the year this Court affirmed the existence of FPC jurisdiction over sales by producers of natural gas,[17] the average price for natural gas sold by producers in Louisiana to pipelines was 9.7 cents per mcf; in 1955 it was 11.2 cents; in 1956 it was 12.4 cents; in 1957 it was 14.2 cents.[18] In a recent six-month period the highest price paid in southern Louisiana vaulted from 17 cents to 21.3 cents.[19] The new proposed price for the same area is over 23 cents[20] and this plateau will inevitably and shortly be dwarfed if the FPC is permitted to persist in its refusal to regulate initial prices. It is a well understood fact of life in the natural gas industry that each new high price for gas becomes the effective price floor in future negotiations.[21] It is against this background of galloping

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[17] In *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

[18] Direct Sales by Producers of Natural Gas to Reporting Interstate Natural Gas Pipeline Companies—1957 (undated pamphlet issued by FPC), p. 5.

[19] *Superior Oil Co.*, 19 F.P.C. 637, 639 (1958) (dissenting opinion of Commissioner Connole).

[20] *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 262 (1958), *appeal pending sub nom. United Gas Improvement Co.* v. *FPC* (3d Cir. No. 12797).

[21] In *Superior Oil Co.*, 19 F.P.C. 637, 639 (1958) the following testimony is quoted:

> "GENEAU [FPC staff counsel]: Is it your understanding that the highest price being paid for gas by any other pipeline company in the area is determinative of what price is asked?

price inflation and the aims of the Act "to create a comprehensive and effective regulatory scheme"[22] and "to protect consumers against exploitation at the hands of natural gas companies"[23] that the validity of the FPC's hands-off policy toward initial prices in CATCO and in other cases should be weighed.[24]

A. The FPC abandoned consumer price safeguards at CATCO's insistence, and the Court below properly reversed.

The sale by CATCO involves the largest reserve ever committed to one sale (R. 521). The proposed initial price, which the FPC's third order sanctioned without proof of its justness and reasonableness, is over 25% higher than Tennessee had committed itself to pay anywhere else (R. 216a), about 70% higher than Tennessee's weighted average cost of gas (R. 44a) and more than 100% greater than the price paid by Tennessee in southern Louisiana (R. 149a).

"BARNETT [Vice President in charge of gas supply of United Gas Pipe Line Company]: As far as I am concerned, yes, because that is what we have to meet if we want to buy the gas."

See also the dissenting opinion in *Transcontinental Gas Pipe Line Corp., supra*, 20 F.P.C. at 301, citing testimony that the CATCO purchase set a floor for new prices for southern Louisiana gas.

[22] *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 520 (1947).

[23] *Ibid.*; *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610 (1944); *FPC* v. *Interstate Natural Gas Co.*, 336 U. S. 577, 581 (1949); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 685 (1954); *City of Detroit* v. *FPC*, 230 F. 2d 810, 817 (D.C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956).

[24] The extent of the harm to the public resulting from the ever higher initial price levels may be surmised from the fact that the FPC's staff has indicated a cost-based rate of 8.7 cents (exclusive of tax) for sales from a major southern Louisiana field where sales are now being made at 22.55 cents (exclusive of tax). *Texas Co.*, Docket G-8969, Exh. 110.

The only price "justification" was tangential; it consisted of evidence of arm's length bargaining (R. 43a) and of the desirability of the purchase from Tennessee's viewpoint (R. 41a-42a). CATCO attempted to minimize the importance of the steep initial price by asserting that prices in other contracts would not be triggered upward, but this assertion was shown on cross-examination to be of doubtful accuracy (R. 149a-159a).[25]

Twice the FPC examined this record and twice it found that there was no evidence which would support a determination that this apparently excessive price was within a reasonable range or might ultimately be found to be within a reasonable range. After the first examination the FPC found that (R. 521)

> "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See Cities Service Gas Co., Signal Oil and Gas Co., 14 F.P.C. ——, opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as Signal Oil and Gas Co. *v.* F.P.C., 238 F. 2d 771 (CA3), certiorari denied, 353 U. S. 923".

[25] Nevertheless, the CATCO Brief, pp. 4, 25, 29 flatly states there will be no triggering.

After its second examination of the same record, the FPC said (R. 528)

> "As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at the particular rate level."

On rehearing, on the identical record, the FPC ignored the factors which made "it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." Solely because Tennessee alleged that CATCO had threatened to withhold its gas, the FPC sanctioned the proposed initial rate of 21.4 cents. Its about face was excused in its third order as follows (R. 487):

> "In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas System is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4 cent rate [ex tax] is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require."

Thus, clearly revealed is a policy that price considerations are to be secondary where there is a great need for the gas,[26] at least where the proposed price is not shown to be excessive.[27]

Price was seriously in issue, as the FPC itself recognized. Its first and second orders provided safeguards against exploitation of the public until a determination of a just and reasonable price could be made. But when CATCO made it clear that it would require as the *quid pro quo* for committing its gas the abandonment of all effective safeguards and unconditional approval of the price which Tennessee, motivated solely by its own business interest had agreed to pay, the FPC capitulated and issued the order under review. In effect it made a finding therein that the public convenience and necessity require the sale regardless of the price.

When rehearing on this order was asked, the objecting parties urged the indispensability of a determination that the 21.4 cent price was required by the public interest.[28]

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[26] The record is devoid of any evidence of great need for gas and, in fact, there is no special need for the gas, let alone a great need, as we show in point 4, *infra*.

[27] This ignores the fact that the burden of proof on price is on the applicant. *Cities Service Gas Co.*, 12 P.U.R. 3d 3, 14.

[28] LILCO phrased its objection to the third order as follows:

> "The Commission as a matter of law cannot grant these producer applicants permanent certificates upon a determination based entirely on a claimed need for additional natural gas by Tennessee's customers. A proper and lawful certificate can only be granted under the Natural Gas Act on a determination based on adequate evidence that the applicants are able and willing to furnish the proposed service, the proposed sales of natural gas to Tennessee are required, *and* that the rates under which the proposed service will be rendered are in the public interest." (R. 585) (Emphasis in original)

See also the objections of Public Service (R. 595) and of the PSC (R. 539). Public Service also urged as error the finding that CATCO was willing to conform to the Act (R. 462a).

The Court below, in reversing, held that the FPC could not bind itself in a §7 proceeding to conduct a limited inquiry into just some of the elements comprising the public convenience and necessity to the exclusion of price.[29] Thus, the holding of the Court was based on precisely the issue tendered to the FPC in the requests for rehearing—*i.e.*, the indispensability of price consideration. Because the Court phrased its objection to the FPC's action in terms of jurisdiction, rather than in terms of power,[30] Tennessee and CATCO argue[31] that the Court committed reversible error in deciding, *sua sponte*, on a ground not urged before the FPC. Factually they are incorrect because the ground—indispensability of price consideration—had been urged on the FPC as fn. 28, *supra*, shows. The raising of the objection (not the precise legal conclusion) is all that is required by §19(b) of the Act.[32]

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[29] By quoting from the decision below out of context CATCO and Tennessee conclude that the Court's holding was that CATCO's refusal to accept a certificate ousted the FPC of jurisdiction to consider the matter further. CATCO Brief, pp. 11-13, 31-39; Tennessee Brief, pp. 33-36. We do not believe that a fair reading of the entire decision supports this conclusion. Accordingly we believe that the elaborate arguments CATCO and Tennessee make in support of the undeniable proposition that an applicant need not accept a certificate unsatisfactory to it and that such non-acceptance does not affect the FPC's jurisdiction are irrelevant.

[30] Actually, the Court below phrased its objection both in terms of lack of jurisdiction (R. 658) *and* lack of power (R. 662). In the context of the opinion, it seems clear that the two terms are synonymous.

[31] Tennessee Brief, pp. 19, 37-39; CATCO Brief, pp. 13-14, 43-47.

[32] Even assuming that "power" and "jurisdiction" mean different things here, and that the precise objection of the Court had not previously been urged on the FPC, there is no substance to the *sua sponte* argument, for absence of jurisdiction may be raised at any stage. The cases cited by Tennessee and CATCO actually lend support for this proposition. Thus, in *American Power & Light Co.* v. *SEC*, 141 F. 2d 606 (1st Cir. 1944), *aff'd*, 329 U. S. 90 (1946) the Court of Appeals held that since the argument that the SEC is

In sum, then, CATCO rejected the fair second order and insisted that it be allowed to charge the apparently excessive 21.4 cent price and keep any excess over a reasonable price for the period between the beginning of the service and the effective date of a rate determination. It other words, CATCO refused to sell at a reasonable rate for the period in question, a period it would have no incentive to shorten if it could continue to retain the excess during its pendency.

The FPC had no right to accede to this extortionate demand. Consider the analogy of a pipeline, or of any utility: if the utility seeking a certificate to embark on a service refuses to render the service unless it is allowed to charge more than reasonable rates, the regulatory

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not authorized (*i.e.* has no jurisdiction) under §11(b)(2) of the Holding Company Act to order dissolution of subholding companies had not been raised before the SEC, it could not be considered by the Court in reviewing the SEC's action. On appeal this Court decided that argument on the merits. 329 U. S. at 112-115. Implicit is the holding that a court may address itself to questions of jurisdiction whether they have been raised previously or not.

Such a holding is reconcilable with the §19(b) requirement. §19(b) is intended to insure that judicial review will follow only after the exhaustion of administrative remedies. *FPC* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499-500 (1955). This Court stated (348 U. S. at 501):

> "The necessity for prior administrative consideration of an issue is apparent where, as here, its decision calls for the application of technical knowledge and experience not usually possessed by judges. The Federal Power Commission is an administrative agency the decisions of which involve those difficult problems of policy, accounting, economics and special knowledge that go into public utility rate making. For reviewing a rate made by the Federal Power Commission, the Court of Appeals has no inherent suitability, comparable to that which it has for reviewing the judicial decisions made by a United States District Court."

It is submitted that the Court of Appeals has the "inherent suitability" required to pass on a question of jurisdiction under a statute; the FPC has none. Therefore, the doctrine that administrative remedies must be exhausted (premised as it is on the proposition that the administrative agency has special knowledge and competence) is inapplicable.

commission may not accede with the excuse that the utility is stubborn and the public wants the service. The Commission at that point is required by its statutory mandate to refuse the certificate. If the public wants the service even at the expense of paying more than reasonable rates,[33] the remedy lies in changing the statute so as to permit more than reasonable rates to be charged.

That is why the Court below was correct in its analysis. The FPC had no power under this price-oriented statute to let the producers receive the excess over reasonable rates for the expectedly long period between the beginning of the service and the effective date of a rate decision.

B. The statute and its history require the FPC to exercise its powers to protect the public against excessive initial prices.

1. *Rates are the heart of natural gas regulation.*[34]

§4(a) provides

> "*All rates* and charges made, demanded, or received by *any natural-gas company* for or in connection with the * * * sale of natural gas * * * shall be just and reasonable, and *any* such rate or charge that is not just and reasonable is hereby declared to be unlawful." (Emphasis added)

The primary object of the Act is to protect consumers against excessive prices charged by natural gas companies.[35] Although it is true that the FPC has "a wide range of

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[33] *i.e.*, if the *value* of the service exceeds the just and reasonable rate.

[34] *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 611 (1944).

[35] *Id.*, at 610; *FPC* v. *Interstate Natural Gas Co.*, 336 U. S. 577, 581 (1949); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 685 (1954); *City of Detroit* v. *FPC*, 230 F. 2d 810, 817 (D.C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956).

discretionary authority in determining whether the public interest warrants certification of any particular proposed service" (*cf. Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 88 (1957)) every exercise by the FPC of its discretion in the administration of the Act must be tested against this primary purpose of the Act; if the FPC action produces a result at variance with the purpose, it is invalid. Otherwise stated, the discretion the FPC has is broad, but may not be exercised so as to defeat the purpose of the Act. Recent cases decided by this Court make this clear.

In *Schaffer Transportation Co.* v. *United States, supra*, the ICC refused to grant a certificate of public convenience and necessity to a motor carrier under Section 207(a)[36] of the Interstate Commerce Act, 49 U.S.C. §307(a). This Court reversed because the ICC's action had failed to give effect to "the sort of 'inherent advantage' that the Congressional policy requires the Commission to recognize" (355 U. S. at 91).

Mr. Justice Frankfurter, who dissented, nevertheless agreed with the principle that the administrative discretion is limited by the policy of the statute. He stated (355 U. S. at 93-94):

> "The Transportation Act of 1940 (amending the Interstate Commerce Act) grants to the Interstate

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[36] Section 207(a), which is substantially the same as §7(e) of the Natural Gas Act, provides:

> "Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *"

> Commerce Commission powers and imposes limitations upon their exercise in terms of greatly varying degrees of definiteness. As a consequence, the range of discretion left to the Commission and, correspondingly, the scope of judicial review of Commission orders greatly vary.
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> "* * * [S]ome rules dealing with the regulation of surface transportation are narrowly specific, leaving practically no scope for discretion in their application by the Interstate Commerce Commission. Other provisions are expressed in terms which necessarily leave considerable scope in the evaluation of their implied ingredients, while still others are of such breadth as to leave even wider opportunity for an exercise of judgment by the Commission not to be displaced by a court's independent judgment under the guise of judicial review."[37]

Although the FPC undoubtedly has a wide range of discretion in certificate proceedings in determining how best to protect the public interest in not paying excessive initial rates (witness the numerous acceptable solutions devised by the FPC, described at pp. 33-35, *infra*) it may not, in the guise of the exercise of discretion, debilitate the Act's primary purpose by relegating treatment of an apparently excessive rate to a proceeding which the FPC admits is inadequate to protect the public interest (*i.e.* inadequate to effectuate the Act's policy).[38]

2. *Only at the certificate stage can the public be protected against excessive initial rates, and Congress intended such protection.*

It is undeniable that unless the FPC is required to exercise a rate function in §7 proceedings, as the sweep-

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[37] See also *American Trucking Ass'ns* v. *United States*, 355 U. S. 141, 149-150 (1957).

[38] *Cities Service Gas Co.*, 12 P.U.R. 3d at 15.

ing language of §4(a) would imply, no protection is provided by the Act against unjust initial rates. Under §4(c) of the Act every natural gas company must file its rate schedules with the FPC. §4(d) provides that "no change shall be made by any natural-gas company in any such rate" without filing the "new schedules." Under §4(e), when "any such new schedule is filed," the FPC may hold a hearing to determine the lawfulness of the new rate. Suspension and refund provisions protect the public against unjust changed rates, but §4(e) is inapplicable to an initial rate.

§5(a) permits the FPC to reduce unjust existing rates after hearings. But

> "A proceeding under §5(a) * * * is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period." *Cities Service Gas Co.*, 12 P.U.R. 3d 3, 15.

Commissioner Kline of the FPC has stated:

> "It is clear that until we establish criteria or standards for determining the justness and reasonableness of producer's rates, the institution by the Commission of a 5(a) proceeding is of little value.
>
> "Accordingly, the *only* practical way in which the Commission can protect the consumer against unwarranted initial prices is by the insertion of a condition in the certificate authorizing the service."[39] (Emphasis added)

Finally, there is no general reparation power in the FPC. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 254 (1951).

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[39] Address delivered on September 16, 1958 at New Orleans, Louisiana, before the Independent Natural Gas Association of America convention. Copies of the speech were distributed.

Thus, unless the FPC has the duty to protect the public interest in reasonable rates in the §7 proceeding, as a practical matter a gaping hole in price protection exists.[40]

However, §7, as originally enacted in 1938, and as amended in 1942 required effective scrutiny of initial rates.[41] In 1942 the original §7(c) was stricken and the present §§7(c)-7(g) were substituted. Act of February 7, 1942, c. 49, 56 Stat. 83. Commissioner Manley of the FPC stated that the amendment:

> "* * * *will have the effect, of giving the Commission an opportunity to scrutinize* the financial set-up, the adequacy of gas reserves, the feasibility of the proposed services *and the characteristics of the rate structure at a time when such vital matters can be revised and modified as the public interest demands.* Without this authority, the Commission is too often confronted with a situation in which it must either accept conditions which appear to be undesirable from the public standpoint or take the alternative course of subsequently requiring changes which may have much more serious consequences than would have been the case if such changes had been effected before the public was invited to invest in the new enterprise." (*Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5429*, 77th Cong., 1st Sess. 6 (1941).

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[40] See dissenting opinion of Judge Bazelon in *Oklahoma Natural Gas Co. v. FPC*, 257 F. 2d 634, 648-649 (D. C. Cir. 1958).

[41] Until 1942, §7(c) of the Act provided:

> "In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." Act of June 21, 1938, c. 556, §7, 52 Stat. 824.

Commissioner Manley's construction was adopted by the House Committee in recommending enactment of the amendment. H. Rep. No. 1290, 77th Cong., 1st Sess. 2-3 (1941). See also Sen. Rep. No. 948, 77th Cong., 2d Sess. 1-2 (1942); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5429*, 77th Cong., 1st Sess. 18-19 (1941); *Signal Oil & Gas Co.* v. *FPC*, 238 F. 2d 771, 774 (3rd Cir. 1956); *Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634, 650 (D.C. Cir.) (dissenting opinion), *cert. granted*, 79 S. Ct. 117 (1958), *dismissed on motion of petitioners* February 20, 1959.

Since price protection to the public is at the heart of the Act; since price protection was needed in this case; since price protection could not be afforded under §§4(e) or 5(a) and was intended by Congress to be extended in certificate proceedings; it follows that the FPC committed legal error in its third order.

II

The FPC has avoided its responsibility to protect the public against excessive initial rates.

We attempt to show here that (A) the FPC has consistently and effectively safeguarded the public against excessive initial rates of pipelines, but (B) in dealing with initial rates of producers it has failed to set up a reasonable system. We then indicate (C) how the FPC could employ the field price concept to this end in the present interim period.

A. FPC treatment of initial rates—pipeline cases.

Following the intent of the 1942 amendment that rates be scrutinized at a time when revision and modification can be made in the public interest (*i.e.*, at the certificate

stage) rather than subsequently (*i.e.*, in §5(a) proceedings when complete protection can not be afforded) the FPC has uniformly required pipeline applicants to show their proposed initial rates to be just and reasonable either in the certification proceedings, or in some ancillary proceeding, but always under circumstances in which the public interest in price was protected from the outset.[41a]

Thus, when a pipeline company requests a certificate for a new sale, the FPC maintains that the pipeline has the burden of sustaining the proposed rate. This the pipeline attempts to do by presenting the best information then available on the cost of construction, expense of operation and anticipated revenues. When a pipeline applicant does not sustain this burden, the FPC, consistent with its view that an "essential ingredient" comprising the public convenience and necessity is lacking, has followed several courses. One course is simply to deny the application. *Transcontinental Gas Pipe Line Corp.*, Docket G-12059 (page 2 of order issued December 17, 1958). There the FPC stated:

> "Since the company [Transcontinental] has not sustained the rates for these services, we *must* deny the facilities for rendering them, as well as all requests for gas to have been delivered thereby." (Emphasis added)

A second course is to authorize the sale, but only if a rate condition is accepted. See, *e.g.*, *Tennessee Gas and Transmission Co.*, 4 F.P.C. 293, 305-306 (1945); *Transcontinental Gas Pipe Line Corp.*, 9 F.P.C. 32, 63 (1950); *Texas Illinois Natural Gas Pipeline Co.*, 9 F.P.C. 105, 125 (1950); *Tennessee Gas Transmission Co.*, 9 F.P.C. 271,

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[41a] See the FPC's Annual Reports to Congress: 1949 Report 114; 1950 Report 115-116; 1951 Report 109; 1952 Report 110-111; 1953 Report 112; 1954 Report 127.

294 (1950); *Erie Gas Service Co.*, 10 F.P.C. 22, 34-35 (1951); *United Gas Pipe Line Co.*, 10 F.P.C. 35, 70 (1951).

A third course is to grant a certificate, thereby permitting construction of the requested facilities, but require that an acceptable rate be filed prior to the commencement of service. See, *e.g.*, *Michigan-Wisconsin Pipe Line Co.*, 6 F.P.C. 1, 20 (1947),[42] *aff'd sub nom. Panhandle Eastern Pipe Line Co. v. FPC*, 169 F. 2d 881 (D.C. Cir.), *cert. denied*, 335 U. S. 854 (1948); *Trans-Continental Gas Pipe Line Co.*, 7 F.P.C. 24, 47 (1948); *Alabama-Tennessee Natural Gas Co.*, 7 F.P.C. 257 (1948); *Trunkline Gas Supply Co.*, 8 F.P.C. 250, 260 (1949); *Alabama-Tennessee Natural Gas Co.*, 9 F.P.C. 461, 462 (1950); *Houston Texas Gas & Oil Corp.*, 16 F.P.C. 118, 144 (1956).

Another possibility is to withhold the requested certificate pending the receipt of additional evidence. See, *e.g.*, *Kansas Pipe Line & Gas Co.*, 2 F.P.C. 29, 58 (1939).

Still another possibility is to permit the proposed rate to go into effect as an "interim" rate for a limited period, the applicant being required to agree to refund the excess over a reasonable rate as determined in supplementary hearings.[43] *Alabama-Tennessee Natural Gas Co.*, 9 F.P.C. 849 (1950).

B. FPC treatment of initial rates—producer cases.

In contrast to its firm policy on pipeline initial rates, the FPC has exhibited a marked disinclination to face the producer initial rate problem at the time when the

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[42] In *Michigan-Wisconsin, supra*, the FPC adopted this course to permit further study "to determine whether the proposed rates or some other form of rates will assure the lowest reasonable ultimate consumer charges and at the same time give to the distributing companies an incentive for the sound expansion of their gas utility business." 6 F.P.C. at 20.

[43] Such an interim rate may not be increased under the provisions of §4(d) of the Act. *Alabama-Tennessee Natural Gas Co. v. FPC*, 203 F. 2d 494, 497 (3d Cir. 1953).

§7 certificate is issued. This disinclination is based on the lengthy time anticipated in determining reasonable rates. However, if rate cases could be expected to be short, there would be less need for protecting the public during the period between the beginning of the service and the rate decision.

This creates a dilemma for the FPC. We do not say that we are indifferent to the prospect of long certificate hearings during the infancy of producer regulation; nor do we say the FPC is at fault for failing thus far to have resolved all the problems of regulating the rates of producers; nor do we say that the FPC must specifically find that a proposed initial rate is just and reasonable before a §7 certificate issues to a producer.[44]

Our position is that the FPC has the techniques to protect the public against excessive producer prices in the period during which the ground rules of regulation are being evolved and it must adopt criteria in §7 proceedings reasonably calculated to unearth those initial rates calling for the application of these techniques.[45]

The FPC purports to have found these criteria, but the history of its decisions reveals that the criteria have either been ignored or distorted when they became applicable.

1. Cities Service Gas Co.[46]

The going price in the area was 10 cents and the proposed price for the sale from Signal to Cities Service

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[44] Tennessee devotes considerable attention to the proposition that the Act does not require that a finding be made that the initial price is just and reasonable before a §7 certificate issues, Tennessee Brief, pp. 22-27. As stated above, we do not argue the contrary.

[45] Unless, of course, the producer supports the proposed rate on its merits.

[46] 12 P.U.R. 3d 3 (1955), *aff'd sub nom. Signal Oil & Gas Co. v. FPC*, 238 F. 2d 771 (3d Cir. 1956), *cert. denied*, 353 U. S. 923 (1957).

was 12 cents. Oklahoma Natural (not subject to FPC jurisdiction) and Lone Star, other purchasers in the area, showed that 10 cents was the highest price paid there and that they would have to meet any new higher prices in their future purchases. They also showed that their first party favored nations clauses[47] would then increase the prices for most of their existing purchases in the area to such new high price. There were no third-party favored nations clauses which would increase the Oklahoma Natural and Lone Star purchase prices merely because of the Signal price. The added cost to Oklahoma Natural would be about $2,000,000, and to Lone Star about $1,140,000 a year.

The FPC held that the applicant for the certificate has the burden of proving all the elements of its application, a "vital element" of which is the proposed rate, and that evidence of arm's length bargaining did not satisfy the statutory requirement of reasonableness. 12 P.U.R. 3d at 14.[48] It went on to say that in the face of admitted injury to many parties in the proceeding, a rate structure which had prevailed for some time should not be disturbed without some substantial showing that the change is necessary and that the new level is reasonable.

The injury to the public involved was not an injury to the customers of the purchasing pipeline, but rather to

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[47] These clauses provide that if the buyer purchases elsewhere in the area at a higher price, the contract price automatically escalates to that higher price.

[48] Since *Cities Service* the FPC has done a complete about face on this point. It now holds that evidence of arm's length bargaining, without more, is *prima facie* evidence of reasonableness. See, *e.g.*, *Seaboard Oil Co.*, 19 F.P.C. 416, 421 (1958). Unless an objector shows the proposed price to be unreasonable, it will be allowed. Thus the FPC justified its third order herein in view of "the fact that the record does not show that the 21.4 cent rate is necessarily excessive." (R. 487). This poses a neat problem for objectors since the FPC has also affirmed that it is impractical to permit a §7 proceeding to be converted into a rate case. See, *e.g.*, *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 271 (1958).

the customers of other companies buying in the same area. (There would not appear to be any significant difference between the adverse effect of the Signal high price on the customers of Oklahoma Natural and the adverse effect on the buyers of gas in southern Louisiana resulting from Tennessee's offshore purchase.[49] The FPC was looking at the economic impact on the consuming public generally —even on consumers buying under unregulated purchases— and the FPC insisted on holding the line when such impact was materially adverse unless the producer could prove that the contract price was reasonable.

In so doing the FPC rejected the suggestion that the public would be adequately protected if the FPC were to sanction the 12 cent price and then resort to an immediate §5(a) proceeding to test its justness and reasonableness. The FPC pointed out that a §5(a) proceeding

> "• • • *has several critical disadvantages, all detrimental to the public interest.* • • •
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> • • • • • •
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> "A proceeding under §5(a), moreover, is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period. A proceeding under §5(a) is, itself, more time consuming than the course of action we employ here, thus, *administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance.*". 12 P.U.R. 3d at 15. (Emphasis added)

The FPC's decision was affirmed on appeal, 238 F. 2d 771, the Court holding that the granting of a temporary

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[49] The CATCO purchase set a floor for new prices for southern Louisiana gas. See *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 301 (1958).

certificate[50] did not deprive the FPC of power to impose a rate condition in the final certificate; that the FPC had the same power to condition producer certificates as pipeline certificates; and that there was substantial evidence to support the 10 cent condition.

The Court therefore upheld the rate condition in the absence of justification by the producer of the reasonableness of the 12 cent price and in the absence of any claim that 10 cents was confiscatory.[51]

2. Anthony J. Tamborello[52]

This case was decided the same day as *Signal*, and it involved a proposed 16 cent price (excluding tax) for gas sales in Louisiana to Transcontinental Gas Pipe Line Corporation.[53] The FPC stated that its policy was (11 P.U.R. 3d at 416)

> "• • • to reach agreement on the various rate problems arising in connection with certificate applications prior to or during the hearings on such applications. When this cannot be done, *it is necessary to condition the certificates issued in such proceedings*, to require the filing of proper rates some time in the future."

Having thus reaffirmed its policy, the FPC then abandoned it (*Id.*, at 417):

> "• • • because the economic and other conditions presented in certificate applications filed by inde-

[50] Signal had been serving under a temporary certificate. The rate condition was therefore entered at a time when Signal could not abandon the service without permission. The treatment we urge for producers (*e.g.*, the second CATCO order), would enable them to avoid being thus ensnared.

[51] Significantly, CATCO never has claimed that the 17 cent lower limit set by the second order is confiscatory. The absence of such claim is some support for the inference that the 17 cent price would not have been unjust.

[52] 11 P.U.R. 3d 413 (1955).

[53] Hereinafter called "Transco."

> pendent producers are substantially different from those presented in certificate applications filed by interstate pipeline companies, the commission has not deemed it prudent to expend the time required to resolve rate issues at this stage, nor has it found it practical to inquire into the reasonableness of producer rates in all producer certificate proceedings."

The differences between producers and pipelines calling for laxer treatment of producer prices are not spelled out. However, the FPC hastened to add that it is (*Ibid.*)

> "• • • necessary for the commission to have before it in deciding a producer certificate application the basic facts[54] as to the rates to be charged. If on the basis of such evidence it appears to the commission that examination into the justness and reasonableness of a specific rate of an independent producer in a certificate proceeding is required, there is ample authority in the statute for appropriate inquiry to be made in that proceeding."

Since the rate effect on the pipeline purchaser, Transco, was found to be "negligible, slightly in excess of one per cent, *ibid.*, no such examination was held warranted. Thus, the effect of the price on the buying pipeline was emphasized, rather than on other pipelines, as in *Signal*. In any event, the *Tamborello* standard has also been abandoned. In CATCO, the buyer's purchased gas costs increased about 1 cent (R. 45a), or 8%, and in *Transcontinental Gas Pipe Line Corp. (Texaco-Seaboard)*, 20 F.P.C. 264, they were increased by more than 2 cents. Yet the FPC felt that neither case merited a rate condition.

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[54] What "the basic facts" encompass is not detailed.

3. Natural Gas Pipeline Co. of America[55]

The salient factor in this case was the large unsatisfied demand for gas in the Chicago area. Evidence had been introduced showing 260,000 house heating customers awaiting service. Nevertheless, the hearing examiner concluded that the economic disruption which the proposed price (the amount of which was in disagreement) would cause "would be substantially greater" than that envisaged in the *Cities Service* case and that the producers had "failed to show that the public convenience and necessity" required the certificates to issue on the "terms urged by them.[56] He therefore conditioned the certificate on acceptance of an 11 cent price.

The producers advised the FPC that they would not sell their gas at the 11 cent price and the FPC obligingly reversed its hearing examiner and eliminated the price condition from the certificate. It stated that in *Signal* it had made clear "that the particular circumstances presented in each case are of decisive importance in determining whether" a price condition should be imposed. 16

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[55] 16 F.P.C. 80 (1956), *rehearing denied*, 17 F.P.C. 85 (1957), *aff'd sub nom. Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634 (D. C. Cir.) (2 to 1), *cert. granted*, 79 S. Ct. 117 (1958), *dismissed* February 20, 1959 on motion by the petitioner which stated that the cause had become moot since it had already had to pay an even higher price in the area than the price level it had been contesting in the proceedings. The motion pointed out that the petition for the writ of certiorari "was predicated upon there being a substantial question as to the reasonableness of the rates proposed to be paid for natural gas, arising principally from the fact that the rates proposed were substantially in excess of the prevailing rate in the area which resulted in serious detriment to the petitioner * * *." In other words, Oklahoma Natural could no longer obtain relief, as it was too late.

[56] These conclusions are set forth at R. 342 and 344 in the record filed in this Court on the petition of Oklahoma Natural for review of the 2 to 1 decision of the Court of Appeals upholding the unconditional grant of a certificate. No. 288, October Term, 1958.

F.P.C. at 91-92. It continued that (*Id.*, at 92)

> "• • • these circumstances include the extent to which a convincing showing has been made that as a result of the price proposed, the prices for other sales in the area in question will be increased, keeping in mind such relevant factors as the kind and quantity of gas sold, the degree of competition present in the area, and the extent to which the producer contract in question resembles the other gas sales contracts in the area.[57] But in this case, no convincing showing has been made that as a result of the price proposed under the contract between Natural and the producers, the results we envisaged in • • • [*Cities Service*] will come about. Nor are we satisfied that the competitive conditions in the Jack and Wise Counties area are such as to justify fixing upon 11 cents as the prevailing price."

On rehearing, the FPC stated that price is only one factor to be considered and that other elements overbalanced price (17 F.P.C. at 88).

On appeal the FPC decision was affirmed. The majority decided the case on the premise that the new price was not out of line with prevailing prices (257 F. 2d at 638). In combination with the finding of enormous need for additional gas in Chicago,[58] the majority concluded to treat this as a case like *Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643 (D. C. Cir. 1957), *cert. denied*, 356 U. S. 959 (1958), where the issue was whether every

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[57] An attempt was unsuccessfully made in CATCO to introduce in evidence contracts for the purchase by Tennessee of offshore gas from the West Delta area of Texas at a price of 17 cents, which are materially identical to the CATCO contracts (R. 185a), for the purpose of testing the CATCO price (R. 193a-194a).

[58] The instant case is distinguishable, at least to the extent that here there is no evidence of need.

certificate had to be preceded by a finding as to whether the rate is just and reasonable.[59]

In contrast Judge Bazelon's dissent went behind the FPC's decision and found in the record that the price of 13.9 cents really represented a cost of gathered gas of between 15.3 cents and 17.55 cents. He compared this with the concession on the record that the highest price paid in Jack and Wise Counties was 11 cents and concluded that the *Signal* doctrine was fully applicable since §§4 and 5(a) do not protect consumers against excessive initial rates for the reasons pointed out by the FPC in *Signal*. He stated that (257 F. 2d at 651-652)

> "While parity with field price may not alone be sufficient for a determination of justness and reasonableness of a rate * * *[60] substantial disparity with field price is a sufficiently reliable index of unjustness and unreasonableness of a rate to preclude certification without a rate determination."

Judge Bazelon reasoned that (257 F. 2d at 652-653)

> "* * * however difficult the administrative problem may be, the Commission *must* review and analyze the producers' rate as a vital element of the determination of whether the proposed extension project is required by the public convenience and

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[59] In the *Florida* case, no contention was made that the initial rate was so high as to be unreasonable. The complaint there, made by persons dealing in competitive fuels, was that the price was too low. See 251 F. 2d at 647.

[60] Judge Bazelon cites *City of Detroit* v. *FPC*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956); *Bel Oil Corp.* v. *FPC*, 255 F. 2d 548 (5th Cir.), *cert. denied*, 79 S. Ct. 46 (1958); *Pan American Petroleum Corp.*, 19 F.P.C. 463 (1958). In *Pan American* the two commissioners (Stueck and Kline) joining in the main opinion state (19 F.P.C. at 474)

> "* * * while we are not permitted to use field prices alone in determining whether a price is just and reasonable after it has been suspended by us, no such standard is required of us in determining whether or not we should suspend in the first instance."

necessity. And if, on the basis of analysis there appears a substantial question as to the lawfulness of the proposed rate, it may not certify the project as required by the public convenience and necessity unless it resolves that question. It is, of course, within the Commission's discretion to postpone for a rate proceeding the complicated task of determining the justness and reasonableness of the proposed rate, by conditioning its certificate upon the filing of a lower rate. That course was followed in Cities Service and, with respect to rates other than producer rates, in many other cases [citing the FPC's 1953 Annual Report 112 and 1954 Annual Report 128]."

The above quote is the core of our argument.

4. Seaboard Oil Co.[61]

In this case a sale of Louisiana gas at the proposed price of 19.5 cents was authorized over the claim that an 18 cent condition should have been imposed. The majority opinion (Commissioners Digby and Kline) stated that "high initial prices appearing in some contracts filed with us are a matter of grave concern to us," 19 F.P.C. at 424, but nevertheless it chided those who had raised the initial price issue. 19 F.P.C. at 422.

Three conditions precedent were set forth which the FPC stated would have to be met to warrant a *Signal* type treatment: (1) Would the proposed price affect the price to be paid by customers of the pipeline buyer? (19 F.P.C. at 419) (2) Would it result in other pipelines paying higher prices for gas purchased in the area? (19 F.P.C. at 419) (3) Would it set a new high in any area? (19 F.P.C. at 424). Since the majority was able to find a negative answer to each question it concluded that special scrutiny of the proposed rate was unwarranted.

[61] 19 F.P.C. 416 (1958).

Chairman Kuykendall, concurring, felt that *Signal* could not be reconciled with the *City of Detroit* case[62] and he felt that *Mobile*[63] restricted the *power* of the FPC to impose rate conditions.

Commissioner Stueck also concurred in the result, but disagreed in some unstated ways.

Commissioner Connole dissented. He claimed the conditions precedent were "unrealistically restrictive", citing the fact that except for *Signal*, the FPC had approved unconditionally every initial rate of the hundreds presented to it by producers (19 F.P.C. at 436). He demonstrated the invalidity of the majority's standard (19 F.P.C. at 434):

> "Suppose the proposed price was twice that actually proposed, that is, 39¢ instead of 19.5¢. Despite this absurd figure majority's standards still would offer no basis for denying or conditioning the authority sought. Here is why it would not.
>
> "First, if we substitute 39¢ and the prevailing price of 17¢ in the calculation used by a majority on page 419, the effect on United's cost of gas would still be a *de minimis* seventy-three hundredths mill per MCF. Secondly, as majority points out, the price would 'trigger-off' no favored nations clauses in United's contracts because United's contracts have none, and there is nothing in the record whether it would affect any other prices in the area.
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> "Thirdly, since there would be no specific measurable result on the general price structure and since

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[62] 230 F. 2d 810, holding that field price data alone was insufficient to support a rate increase under §4.

[63] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956). *Mobile* does not so tie the FPC's hands. There the Court held that the initiative for entering into contracts rests with buyer and seller, producer and pipeline or pipeline and distributor. But this does not mean that when a company seeks to operate as a natural gas company and submits a rate schedule, the FPC may not reject the schedule entirely or impose a condition as specifically provided in §7.

> majority have rejected the axiom that high prices, *per se*, inevitably affect the entire demand-supply structure there is no basis for questioning the price level even if it sets a new high.
>
> "I conclude, therefore, that under majority's standards there would be no support in this record for a denial of an application of the issuance of a conditioned certificate for the sale of gas at 39¢."

Part of the majority standard for determining whether a price condition would be imposed was whether the price represented a new area high; Commissioner Connole advocated, instead, examination of the pattern of prices in the area to determine whether the new price is in line with the field price, the going price (19 F.P.C. at 428):

> "The point is that if a price which will affect the customers of one pipeline or result in general price increases in the area is good cause to impose a pricing condition, then certainly potential danger to an entire demand-supply structure is better cause. And steadily rising prices, unchecked by economic forces and unimpeded by regulatory action, inevitably will cause such damage. * * * Obviously, any price higher than the generally prevailing prices in an area will tend to raise the prevailing price whether it 'pierces the ceiling' or not. This is simple arithmetic. The straw that caused the collapse of the proverbial camel was hardly distinguishable from the rest after the whole pile tumbled. Certainly the total effect on the price structure is no less important to us that the effect of one part of it."

5. Hope Natural Gas Co.[64]

This proceeding involved the sale of gas in West Virginia. The applications for certificates were unopposed, and the FPC, granting the certificates, stated the criteria applicants were required to meet (19 F.P.C. at 407):

[64] 19 F.P.C. 405 (1958).

"• • • if the applicant proves there is a market for the gas at the proposed price[65] and that the project is economically feasible[66] at the proposed price (both market and economic feasibility being factors which we consider in determining public convenience and necessity) that it has sustained its burden of going forward with the evidence, and in the absence of evidence showing that the proposed price or rate adversely affect the public convenience and necessity, the applicant has made out a prima facie case, and a certificate should issue to it."

The FPC found support for this view in *Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643, *cert. denied*, 356 U. S. 959 and *Panhandle Eastern Pipe Line Co.* v. *FPC*, 169 F. 2d 881, *cert. denied*, 335 U. S. 854, both of which are readily distinguishable. In *Florida* there was no claim that the proposed rate was "either unreasonably or in any other respect unlawful." See 251 F. 2d at 647. The certificate was attacked by competing fuel interests whose interest lay in showing the rate was too low.

In *Panhandle* which was not a producer case, but instead involved pipeline rates, the FPC granted a certificate conditioned upon the subsequent filing of a schedule by the pipeline of reasonable rates consistent with the public interest, which filing was to be made before the start of operations.

Panhandle is entirely consistent with the view we take. That is, the FPC need not make a rate case out of a §7 proceeding, but it must apply some technique to prevent the public from being harmed by an unreasonable rate until a reasonable rate can be determined. In *Panhandle*,

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[65] This means nothing more than that a willing pipeline buyer has been found.

[66] Economic feasibility has not been further described.

this finding of a reasonable rate was deferred until after construction was completed, but *prior* to the commencement of service.

Chairman Kuykendall concurred in the result, referring to his *Seaboard* opinion. Commissioner Connole dissented. He said the FPC's records show the 27 cent price was 7.8 cents higher than prevailing producer prices in the county except for one 25 cent contract under which there was no record of sales.

6. Superior Oil Co.[67]

Six weeks after *Seaboard* the FPC scrapped the "new high" test. The price in *Superior* was 21.3 cents; it was higher than any price appearing in a gas rate schedule for the pricing area which was effective and not subject to §4 or §5(a) proceedings. The staff of the FPC presented an exhibit showing eight prices in the area were as high as 21 cents, but §5(a) proceedings were pending as to seven of them and expected for the eighth. A 19.5 cent contract was subject to a §5(a) proceeding; three out of four at 19 cents covered very small reserves, leaving only one contract higher than 18 cents. The staff recommended an 18 cent price condition. (19 F.P.C. at 645-646).

The majority issued an unconditional certificate *on the basis of Seaboard.* Chairman Kuykendall and Commissioner Stueck concurred on the basis of their *Seaboard* opinions.

Commissioner Connole dissented. He cited testimony that the highest price paid by any pipeline in the area must be met by other purchasers, commenting (19 F.P.C. at 639):

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[67] 19 F.P.C. 637 (1958).

"This exchange states the case for considering price in producer certificate applications more clearly and more effectively than all the statistics in our file cabinets. Plainly, the gas purchasing segment of the natural gas industry is running in a treadmill. And each turn of the wheel brings into view another and higher price that must be met if the buyer is only to stand still. And little hope appears that the crazy race against itself will be won unassisted."

7. Transcontinental Gas Pipe Line Corp. (Texaco-Seaboard)[68]

This sale involves 2 billion mcf to be produced in southern Louisiana and offshore. The price ranges from 22.4 to 23.3 cents. Commissioner Connole, dissenting, demonstrated that the *Seaboard* tests were met: Transco's customers had already been obliged to agree to pay an extra 2 cents per mcf as a result of the Texaco-Seaboard purchase subject to their right to contest the increase before the FPC; and Transco was exposed to favored nations increases amounting to $5 million per year; and a new high was set (20 F.P.C. at 299-300).

Nevertheless, Commissioner Hussey refused a price condition and Chairman Kuykendall concurred, again on the basis of his *Seaboard* opinion. Commissioners Stueck and Kline did not vote.

The effect of the triggering is discounted in the majority opinion (20 F.P.C. at 274):

"The fact is, however, that before any such 'triggered' increases could be passed along, filings for increased rates would have to be made by the producers and these would be subject to our scrutiny and control under the rate suspension provisions of Section 4 of the Act."

[68] 20 F.P.C. 264 (1958), *appeal pending sub nom. United Gas Improvement Co. v. FPC* (3d Cir. No. 12797).

Precisely the same was true in *Signal* in the case of the purchases by Lone Star (see p. 37, *supra*) yet in *Signal* the triggering was emphasized in support of the price condition.

C. The relevance and use of field prices

It has been settled that field prices standing alone are inadequate to fix just and reasonable rates for independent producers.[69] Nevertheless, the FPC uses field prices as a yardstick in determining whether to suspend increased rates under §4. *Pan American Petroleum Corp.*, 19 F.P.C. 463, 474; and field prices are also used as of some probative value in determining just and reasonable rates. *Ibid.* The field price concept, as used in this context, is not a simple arithmetic average of all prices charged in the field, or a weighted average, nor is it the highest prices charged in the area. The field price concept is more flexible. Some consideration is given to all prices, but their relative significance will be weighed in light of such qualifying circumstances as the volumes involved, the dates of the contracts, whether the rates provided in the contracts are under examination in Commission proceedings under §4 or §5(a) of the Act, the richness of the gas, etc.

The underlying hypothesis is that in the absence of cost data, a general survey of many prices which are not themselves under attack will indicate a kind of consensus which may permit tentative inferences as to reasonable rates. This hypothesis may be attacked, and it certainly is of decreasing soundness as more experience is gained in regulating produce rates, but as a temporary yardstick there is much to support the FPC's view that field prices

[69] *City of Detroit* v. *FPC*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956); *Bel Oil Corp.* v. *FPC*, 255 F. 2d 548 (5th Cir.), *cert. denied*, 79 S. Ct. 46 (1958).

should be used for the two purposes mentioned above. There is, of course, no justification whatever for using maximum price in an area rather than field prices.

It would seem sensible to use field prices for the further purpose of determining when an initial rate should be gone into.

When the purpose of this criterion relates to the situation of a particular seller in comparison with the many prices which other buyers and sellers have reached, the FPC should not be much interested in merely the highest price reached by others; the FPC should be interested in all prices reached by others over a reasonable period of time.

Thus Commissioner Connole is correct when he says that this criterion should be applied by seeking the price at which a typical new sale of gas would take place,[70] and he and the staff of the FPC are correct in maintaining[71] that prices which are being investigated under §5(a) or which are being collected under bond in §4 proceedings should be given little or no weight.

The FPC has perverted this standard by merely asking for the highest price which others have paid. That standard could not reasonably be used either as a basis for determining when to suspend an increase under §4 or as of any evidentiary value whatever in determining just and reasonable rates. The recurring objection of the majority that field prices lack evidentiary value because of the failure of those proposing field prices as a standard to show their comparability (see, *e.g.*, *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 272) lacks substance

[70] See Connole, *Threshold Prices: A Practical Proposal for Producer Pricing*, 63 Pub. Util. Fort. 23, 35 (1959). See also the dissenting opinions of Commissioner Connole in *Seaboard Oil Co.*, 19 F.P.C. 416, 432 (1958) and *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 294, 301-302 (1958).

[71] *Superior Oil Co.*, 19 F.P.C. 637, 645-646 (1958).

because when field prices are used by the FPC for other rate-making purposes, they are subject to the same theoretical defect (*Id.*, at 294-295). Furthermore the FPC has a responsibility to have the facts fully developed. *Cf. Isbrandtsen Co.* v. *United States*, 96 F. Supp. 833, 892 (S.D.N.Y. 1951), *aff'd*, 342 U. S. 950 (1952).

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We have attempted to show that since *Signal* the FPC has totally failed to regulate initial rates of producers. Indeed, it has requested Congress to relieve it of any obligation in this area.[72] If Congress complies, it will merely eliminate what the FPC has converted into a useless formality, because, as history shows, the FPC has set standards for regulation, only to ignore them. In effect the FPC has become a disinterested observer of the natural gas price spiral, its protestations of concern to the contrary not withstanding. It has taken refuge in the notion that somehow the public's interest in just prices will eventually be vindicated when forces of supply and demand balance. But any remedy achieved in the area of natural gas regulation through the operation of supply and demand is a nostrum, for price regulation in an area proceeds from the axiom that the public interest in just prices in that area is not protected by the free interplay of economic forces.

In sum, CATCO is merely symptomatic of the FPC's abhorrence of becoming what it describes as a "peacetime OPA", see 20 F.P.C. at 273, and its unwillingness to interfere with supply and demand factors. The reversal by the Court below of the FPC's CATCO decision has been ignored by the FPC in *Texaco-Seaboard*. *Signal* is

[72] Its 1958 Annual Report asked "That the pertinent sections of the Natural Gas Act be amended to provide for (1) elimination of any requirement for certificates of public convenience and necessity for producers of natural gas" (p. 15).

limited to its facts. We submit that even apart from the compelling facts in CATCO, the Court should affirm for the reason that although the FPC has a wide range of discretion in determining how to safeguard the public interest in reasonable initial prices, its exercise of that discretion is limited to procedures reasonably designed to accomplish that end (see pp. 28-30, *supra*), which it has not yet done. We urge that at this stage of the FPC's regulation of producer rates, comparison with going field prices, and consideration of such related matters as the volumes involved, the effect on the buying pipeline, and possibilities of escalation, would be an adequate test of the reasonableness of a proposed initial rate. The CATCO price would not survive it, whatever the need for the gas.

III

The argument that administrative convenience requires deferring initial rate considerations to §5(a) proceedings is baseless.

As Commissioner Connole has noted:

> "Investigation of proposed sales to determine whether the public convenience and necessity requires them at proposed prices has not been tried and found difficult, to paraphrase Chesterson [sic]. Rather it has been found difficult and not tried." *Seaboard Oil Co.*, 19 F.P.C. 416, 432.

The FPC's convenience would actually be served by applying a *Signal*-type solution, for (*Id.*, at 435):

> "If the proposed price is within the range of going prices obviously there will be no need of any hearing, protracted or otherwise. And proof that it is within the going price range easily can be filed with the application and verified from the annual reports filed by producers with the Commission. In such a case obviously there would be no delay at all. On

> the other hand, if an applicant believes it can support a price higher than the going price in the area, there are two alternatives open to it which would enable it to render service promptly. Both have been used by us. See the *CATCO* case, G-11024, *et al.* It may file for and obtain a certificate on a price level within the going range and promptly file for an increase in rates upon the issuance of the certificate. The requisite contractual agreement of the purchaser to such a procedure should be no more difficult whether the certificate has issued or not. As a second alternative, applicant could accept temporary authority at a going price and attempt to justify a higher price at the subsequent hearing. Only if an applicant seeks to obtain a certificate at a price higher than what might be termed the going price in the area and only if it refuses to avail itself of the procedures open to it for initiating production and sales will any delay ensue at all. But such a refusal on the part of the producer obviously would be the producer's fault and not the Commission's."

Moreover, no greater administrative burden would be imposed on the FPC if the second CATCO order, for example, had been adhered to than exists under the inadequate solution offered by the FPC of deferring price considerations to §5(a) proceedings.

The third order in CATCO relegated the inquiry into the 21.4 cent price to a §5(a) proceeding. It is submitted that the second order in CATCO setting an initial price of 17 cents and permitting immediate escalation to 21.4 cents posed no greater burden. Whether the rate investigation is to occur in a §4 proceeding, as envisaged by the second CATCO order, or in a §5(a) proceeding, called for by the third CATCO order, the FPC would be required to supply a hearing examiner, staff counsel and experts, and space. It is difficult to see how the hearing envisaged

by the second CATCO order would be any more time-consuming than the hearing suggested by the third CATCO order. Furthermore, the onus on the FPC may be greater in a §5(a) proceeding since it may have the burden of showing excessiveness.[73] In proceedings under other sections of the Act, the burden of showing the reasonableness of a rate is on its proponent.

Moreover, if the reasonableness of the initial rate is decided in a §5(a) proceeding, the producer has no incentive to expedite the case; the longer it goes on, the longer the producer will be allowed to collect *and keep* any amount by which the rate is found excessive. But if the question is decided in a §4 case, or through one of the other procedures we have mentioned, the producer will not be subjected to the temptation to dally. Thus, the administrative burden in a §5(a) case is considerably greater. All these matters considered, it is difficult to see how administrative convenience provides any reason for preferring a §5(a) proceeding.

In the *Cities Service* case, the FPC took the position that relegating consideration of the reasonableness of proposed initial rates to §5(a) proceedings would be "administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance." 12 P.U.R. 3d at 15. Now, precisely the reverse is argued.

Nor would the course we advocate result in an end to the abridged hearing procedure provided by the FPC's

[73] If, as in the pending §5(a) proceedings involving the CATCO companies, the FPC staff declines to accept this burden (see fn. 15, p. 12, *supra*), other parties will be required to develop the pertinent facts which are within the knowledge of the producers. For this purpose, resort must be had to extensive discovery procedures which would prolong matters even if the FPC cooperates fully. But see *Union Oil & Gas Corp. of Louisiana*, 17 F.P.C. 544 (1957) which indicates a highly restrictive FPC policy toward discovery procedures.

rules. 18 C.F.R. Section 1.32(b). In the case of the majority of producer certificate applications where the price proposed is not out of line there would be no need for lengthy hearings and no need for extensive findings.

IV

The Record is Devoid of Any Evidence of Need. No Valid Finding Could be Made that a Need for the CATCO Gas Existed, Therefore, and Absence of Price Justification Could Not be Excused on the Basis of Need.

Petitioners support the third order, and the FPC's decision to certificate the CATCO sale without requiring support for the proposed price, because the gas involved was "urgently needed."[74] This conclusion could not stem from anything in the record, since the only record reference even remotely relating to need came in response to a question as to why Tennessee had entered into the CATCO contracts. The response was

> "• • • to obtain gas reserves to supply the expansion of Tennessee's markets, as is shown in Tennessee's pending application in Docket G-11107." (R. 41a).

This testimony was given on February 28, 1957. Hearings had not yet begun on Tennessee's application in G-11107,[75] nor were they to begin until May 14, 1957, which was six days prior to the second order in CATCO. No final order

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[74] Tennessee Brief, p. 13. The CATCO Brief, p. 17, describes the demand for gas as "great".

[75] This is the proceeding in which Tennessee was asking permission to construct facilities to sell 249,000 mcf of gas per day to its existing distribution company customers.

was entered in G-11107 until January 28, 1959, *subsequent to the Court of Appeals decision herein,* and some eighteen months after the third CATCO order which presciently and conveniently divined a great need for the CATCO gas.

Even ignoring the sequence of events, and assuming that the FPC in June of 1957 could foresee that in January of 1959 it would authorize the Tennessee expansion, it was not entitled to consider that fact in determining that a great need for the CATCO gas existed. Due process of law requires that the facts which are considered by the tribunal must be disclosed at the hearing and made part of the record. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292 (1937). The tribunal may not afford recognition to facts not disclosed at the hearing by official notice. *Ibid.,* 300-302. Even passing these considerations, the conclusion of need must be supported by findings of the essential facts. *In re United Corp.,* 249 F. 2d 168, 179-180 (3d Cir. 1957), and cases cited. Such findings are absent because the record lacks *any* facts on the subject.

The FPC also knew of an application made by Tennessee late in 1955 for authority to extend its marketing area to the middle west through a subsidiary, Midwestern Gas Transmission Company, Dockets G-9451 and 9453, and to serve 200,000 mcf per day in the area. This proposal is still pending; it has been hotly contested.[76] But we may assume that Tennessee will eventually be successful. Even so, there is more than reasonable doubt that facts could be adduced to support any finding of great need by Tennessee which would warrant the FPC's wholly ignoring the question of price. In 1958 Tennessee was able to represent in support of a prospective sale of securities that

[76] See *Midwestern Gas Transmission Co.* v. *FPC,* 258 F. 2d 660 (D.C. Cir. 1958) for a description of some of the proceedings.

> "the estimated reserves under all contracts are equal to approximately twenty times the estimated annual input requirements of the presently authorized and proposed facilities. * * *"[77]

Since the CATCO gas makes up 11 or 12% of Tennessee's total reserves (R. 139a-140a), this means that without the CATCO gas Tennessee has about an eighteen year reserve, including its new service requirements authorized in G-11107 and assuming that it is ultimately authorized to serve the midwestern market. An eighteen year supply is quite in line with the number of years' supply available to the other major pipelines in the United States, and exceeds some of them.[78] Thus even if the FPC were able to do what *Ohio Bell, supra,* says it may not do, it is difficult to find any need, let alone urgent or great need.

The wisdom of the *Ohio Bell* holding is apparent in this case. The FPC justifies its action on the basis of a finding shaped out of thin air; no opportunity ever existed to cross examine on the question of need or to introduce evidence showing the absence of need because no attempt was made to prove need. Elementary fairness thus requires the *Ohio Bell* holding.

Even if we assume the existence of a need for the gas, would this then justify discretionary abandonment of the price issue? An affirmative answer necessarily means that price considerations may be subordinated to need, if not

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[77] This is a portion of a report made by Ralph E. Davis, a geologist, who had made a recent study of Tennessee's natural gas reserves. The report was set forth on p. 17 in the registration statement filed by Tennessee with the Securities and Exchange Commission on February 26, 1958. (File 2-13923).

[78] El Paso Natural Gas Company, one of the bidders for the CATCO gas, has substantially smaller reserves. *El Paso Natural Gas Co.*, Dockets G-12580 and 13862 (pp. 6-11 of mimeo. op. dated February 26, 1959).

to other considerations. However, the Act's primary policy is to protect consumers against excessive gas prices. As shown above, it is settled that any discretion exercised by the FPC must be in furtherance of that policy. *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 88 (1957); *American Trucking Ass'ns* v. *United States*, 355 U. S. 141, 149-150 (1957). It may be that in a proper case some exceptional circumstance could justify a discretionary subordination of price, even in the face of the policy of the Act. For example, an imminent curtailment of service to existing customers would make understandable the FPC's sanctioning a purchase at whatever price the seller could exact if the gas were otherwise unobtainable. Since the FPC has no power to compel a natural gas company to extend its service, see *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F. 2d 675 (3d Cir. 1953), it could very well, in the emergency, fall back on §5(a) proceedings in partial protection of the public interest in price.[79]

Of course, we have no such exceptional circumstance in the instant case. We have here merely a pipeline's desire to take on new business.

Apart from the absence of facts of record to show that Tennessee's midwestern expansion plan was preferable to those of other pipelines, the FPC had and has nothing before it to enable it to find that the detrimental effects to existing customers of an expansion outweigh the advantages reasonably to be anticipated by new customers. Under present FPC regulatory policy, existing customers

[79] It is interesting to note that in a wartime emergency with essential production already having suffered periodic interruptions and with residential usage threatened because of a "severe shortage of natural gas", the FPC still insisted on following the statutory command. It granted a certificate permitting the construction of facilities needed for a proposed sale of gas which would have alleviated the shortage, but required acceptance of a price condition nevertheless. See *Tennessee Gas & Transmission Co.*, 4 F.P.C. 293, 301, 306 (1945).

are required to pay higher rates whenever a pipeline acquires high priced gas to serve new customers because the cost of the high priced gas is "rolled in" to the pipeline's cost of service, and this cost of service is borne by all of its customers. The advantage to the new group may be measured by comparison of the cost of the gas to it with the cost of competing fuels. The detriment to the existing customers may be measured by the increased cost to them occasioned by rolling in the new high priced gas. These measures would afford some basis for rational examination of where the public interest lies, *even assuming the price for the new gas is reasonable or is not to be questioned.* But no such measures were taken.

Thus, when the FPC said there was a need for the gas, it was equating Tennessee's desire for additional gas for expansion purposes with need. When it said that the need for the gas justified throwing price considerations out the window, it was inevitably saying that price considerations almost always go out the window because practically every certificate case reflects a pipeline's desire to have additional gas so that it may take on new business. This is not a *reductio ad absurdum;* the absurdity is present in this very case. With usage of natural gas expanding, the FPC's type of "need" will always exist; at precisely the time when the purpose of the Act to protect consumers against unjust prices requires implementation, the FPC in its discretion waives that purpose.

We urge that the price protective provisions of the Act may be ignored, if at all, in only the most compelling circumstances; that no compelling circumstance of need has been or could be shown here; and that if the FPC's interpretation of need is valid, the public interest in price is emasculated and there may be no purpose in continuing producers' §7 proceedings.

Conclusion

We have endeavored to show that the Act requires effective treatment of initial rates by the FPC, but that the FPC has been content to avoid this duty in producer regulation for the most part. When, as here, the need for applying the Act in full vigor was apparent, the FPC abdicated its responsibility.

For the foregoing reasons it is respectively submitted that the FPC's third order was erroneous and was properly reversed by the Court below.

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April 8, 1959.

APPENDIX

e pertinent provisions of the Natural Gas Act of
21, 1938, c. 556, 52 Stat. 821, as amended by Act
bruary 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. §§717-
are as follows:

TION 4. (a) All rates and charges made, demanded,
ceived by any natural-gas company for or in connec-
with the transportation or sale of natural gas sub-
o the jurisdiction of the Commission, and all rules
egulations affecting or pertaining to such rates or
es, shall be just and reasonable, and any such rate
arge that is not just and reasonable is hereby declared
unlawful.

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Unless the Commission otherwise orders, no change
be made by any natural-gas company in any such
charge, classification, or service, or in any rule,
ations, or contract relating thereto, except after
days' notice to the Commission and to the public.
notice shall be giving by filing with the Commission
keeping open for public inspection new schedules
g plainly the change or changes to be made in the
ule or schedules then in force and the time when the
e or changes will go into effect. The Commission,
ood cause shown, may allow changes to take effect
ut requiring the thirty days' notice herein provided
y an order specifying the changes so to be made
he time when they shall take effect and the manner
ich they shall be filed and published.

Whenever any such new schedule is filed the Com-
n shall have authority, either upon complaint of
State, municipality, or State commission, or upon

its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision

found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * * * *

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * *

SECTION 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct

a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

* * * * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transporation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate with-

out requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation,

construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * * * *